



October 31, 2006

Hal D. Simpson, State Engineer
Colorado Division of Water Resource
1313 Sherman Street, Room 818
Denver, CO 80203

Re: Colorado River Water Conservation District Letter Dated October 27, 2006, Regarding Administrability of the proposed Windy Gap Firming Project

Dear Mr. Simpson:

Trout Unlimited and Western Resource Advocates have reviewed the above-referenced letter and concur with the Colorado River Water Conservation District's analysis and conclusion that the proposed alternatives for operation of the Windy Gap Firming Project cannot be administered under Colorado water law under currently decreed water rights.

As the District points out, all currently proposed Windy Gap Firming Project alternatives call for storage of 90,000 acre-feet in a new reservoir. This additional storage is neither authorized nor contemplated in either the Windy Gap decrees or the Blue River Decree.

Colorado's law is clear. A water right may not be administered if it is not decreed. *Trail's End Ranch v. Colorado Division of Water Resources*, 91 P.3d 1058, 1061 (Colo. 2004); *Shirola v. Turkey Cañon Ranch L.L.C.*, 937 P.2d 739, 744 (Colo.1997). And a direct flow right decree may not be used for storage purposes. See e.g., *New Loveland & Greeley Irr. & Land Co. v. Consolidated Home-Supply ditch & Res. Co.*, 62 P. 366 (Colo. 1900); *Greeley & Loveland Irr. Co. v. Huppe*, 155 P. 386, 388 (Colo. 1916); *Hollbrook Irr. Dist. v. Ft. Lyon Canal Co.*, 269 P. 574, 581 (Colo. 1928); *Handy Ditch Co. v. Greeley & Loveland Irr. Co.*, 280 P. 481, 482 (Colo. 1929); *City and County of Denver v. Northern Colorado Water Conservancy Dist.*, 276 P.2d 992, 999 (Colo. 1955); *Board of Arapahoe County Commissioners v. Upper Gunnison River Water Conservancy Dist.*, 838 P. 2d 840, 852 (Colo. 1992). Therefore, to legally divert flows from the Colorado River or its tributaries for storage in the new proposed reservoir, a new water rights application would have to be filed, or the current Windy Gap decrees formally changed to allow for storage of direct flow rights. If the "prepositioning"

concept is pursued, the Blue River decree would have to be changed to authorize storage of Colorado-Big Thompson water in the new reservoir.

Trout Unlimited and Western Resource Advocates are particularly concerned about the impacts the proposed increased diversions may have on the instream flow rights held by the Colorado Water Conservation Board (“CWCB”). The CWCB holds a number of instream flow rights that could be affected, including instream flow rights immediately below Granby Reservoir (Case No. 90CW300); immediately below Windy Gap reservoir (Case No. 80CW447); down the Colorado River past its confluence with Williams Fork (Case No. 80CW446); and down to its confluence with the Blue River (Case No. 80CW448). These rights are junior to both the Colorado Big Thompson Project and to the Windy Gap Project water rights.

By agreement with western slope entities and incorporated in the Windy Gap decrees, Windy Gap reservoir must release flows necessary to meet both the CWCB’s instream flow rights and the rights of downstream irrigators, but need not release more than the reservoir’s inflow amount. Since the CBT Project controls Colorado River inflows into Windy Gap reservoir and the CBT Project is not subject to the release agreement, storing senior CBT Project water rights in the new reservoir under the “prepositioning” concept would have the effect of getting around the Windy Gap Agreement, injuring both the junior CWCB instream flow rights and any other water right that is junior to the CBT Project. This is precisely the type of injury that a change of water rights decree would be able to address through terms and conditions.

In light of clear Colorado water law and the potential for injury to decreed water rights, including the CWCB’s instream flow rights, we urge you to advise the Bureau of Reclamation that a formal change of water rights decree(s) or a new storage decree will be required to administer the Windy Gap Firming Project under the currently proposed alternatives.

Thank you for your consideration. Do not hesitate to call either of us if you have any questions.

s/Amelia S. Whiting, Esq.
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